



Court found that Wyndham was entitled to the Injunction. [Docket Entry No. 16]. Importantly, on October 15, 2009, Defendant Bartlett filed an Answer to the Complaint. [Docket Entry No. 19].

The Complaint contains nineteen separate paragraphs of factual allegations in support of Plaintiff's various causes of action against Defendants. [See Complaint, ¶¶ 9-28]. In the Complaint, Wyndham asserts a claim against Bartlett for intentional interference with business relations (the "Bartlett Intentional Interference Claim").

## **II. STANDARD OF REVIEW**

Wyndham does not dispute the validity of the principal cases relied upon or the principles stated in those cases cited in Defendant Bartlett's Motion for the applicable standard of review. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). Bartlett, however, takes the same approach as his previous Motion to Dismiss in taking the holdings of those cases to the extreme and drawing an erroneous conclusion from those cases that the applicable standard of review requires a plaintiff to affirmatively prove its case at the earliest stages of the litigation.

A Rule 12 motion to dismiss for failure to state a claim upon which relief can be granted is a motion that challenges the sufficiency of the pleading on the face of the complaint. *Dann v. Studebaker-Packard Corp.*, 288 F.2d 201, 215 (6th Cir. 1961). Such motions generally are not favored and should be granted sparingly and with caution only where it appears to a certainty that no set of facts could be proven at trial entitling a plaintiff to any relief. *Id.* at 215-16. The purpose of a Rule 12(b)(6) motion to dismiss is to allow the defendant to test whether, as a matter of law, plaintiff is entitled to legal relief assuming that everything alleged in the complaint is true. *Mayer v. Mylod*, 988 F.2d 635 (6th Cir. 1993). The purpose is not, however, to weigh evidence which plaintiff offers or intends to offer. *Citibank, N.A. v. K-H Corp.*, 745 F. Supp.

899 (S.D.N.Y. 1990); *see also Niece v. Sears, Roebuck & Co.*, 293 F. Supp. 792 (N.D. Okla. 1968) (holding the function of a motion to dismiss is to test law of a claim, not the facts which support it).

To the extent the Motion is to be considered under Rule 12(c), a motion to dismiss for failure to state a claim under Rule 12(c) is identical to one filed under Rule 12(b)(6), except that Rule 12(c) allows for the motion to be filed after the filing of an answer, while Rule 12(b)(6) allows for the motion to be made in lieu of an answer. As such, in either instance, the Court is to use the same standard in evaluating the motions. *Turbe v. Virgin Islands*, 938 F.2d 427, 428 (3d Cir. 1991). Here, because Defendant Bartlett has previously filed an Answer, his Motion should be considered to be one under Rule 12(c).

### **III. ARGUMENT**

Defendant Bartlett's assertion that Count IV of the Complaint should be dismissed because the interference with business relations alleged by Wyndham only involved contractual relationships is without merit.<sup>2</sup> Bartlett's Motion completely overlooks the actual allegations contained in the Complaint where Wyndham specifically pled interference with existing contractual relationships [Complaint, ¶ 65] and also interference with valid business expectancies with third parties [Complaint, ¶ 65]<sup>3</sup>. As a result, Wyndham's Complaint specifically alleges that Defendants' conduct constitutes intentional interference with both existing contracts and with business expectancies. [Complaint, ¶¶ 67, 68].

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<sup>2</sup> Defendant David Humphrey previously filed a Motion seeking dismissal of Wyndham's claim for intentional interference with business relations, which this Court denied. [Docket Entry No. 132].

<sup>3</sup> Due to a typographical error in the Complaint there are two paragraphs numbered 65 on page 13 of the Complaint.

Defendant Bartlett's Motion implies that a plaintiff cannot plead claims for both interference with existing contract and business expectancies. None of the cases cited by Bartlett, however, make such a finding and are merely recitations of applicable law regarding such claims, thus more appropriate for consideration in the context of a Motion for Summary Judgment, not a Motion to Dismiss such as the one before the Court. Wyndham's Complaint alleges interference by Defendants with both contractual relationships and business expectancies. The conduct outlined by Wyndham in the factual section of the Complaint addresses both claims and, as a result, the Complaint does state a claim for interference with business relations and Bartlett's Motion should be denied.

#### IV. CONCLUSION

Wyndham has properly asserted a claim against Defendant Bartlett for intentional interference with business relations and, as a result, his Motion to Dismiss should be denied.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I hereby certify that on the 2<sup>nd</sup> day of July, 2010, a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. mail, first-class postage prepaid. Parties may access this filing through the Court's electronic filing system.

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